NIGEL LIONEL SCOTT

v.

SUN ALLIANCE AUSTRALIA LIMITED & ANOR.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN J, DAWSON J,
TOOHEY J, MCHUGH J
26 AUGUST 1993

INDUSTRIAL LAW: Employment - Injury sustained by casual worker in the course of employment - Payment of compensation - Basis of payment - Whether a 38 hour week or 16 hour week - Worker employed and paid pursuant to the Tanning Industry Award 1987 - Award made pursuant to the Conciliation and Arbitration Act 1904 (Cth) - Whether basis to be according to rate fixed by individual agreement or by industrial award - Section 69(1)(a)(ii), Workers Compensation Act 1988 (Tas) - 'The Ordinary time rate of pay of the worker (as expressed by reference to a week)' - Whether applicable to rates of pay fixed by individual contracts as well as industrial awards or agreements - Calculation - Whether by reference to the actual number of hours a worker works per week or by some other criterion.

The worker sustained injury in 1989 in the course of his employment as casual labourer with the second respondent ('the employer'). The first respondent was the employer's licensed compensation insurer ('the insurer'). Initially the worker was paid compensation on the basis of a 38 hour week. However, after a period, both the respondents applied to a Workers Compensation Commissioner for a review of those payments. They sought a determination that the amount of weekly compensation to be calculated by reference to a 16 hour week. The application was dismissed by the Commissioner. An appeal to the Supreme Court of Tasmania was also dismissed, but the appeal to the Full Court of the Supreme Court of Tasmania was allowed.

The worker was employed for eight hours on the Wednesday and Friday of each week. At all material times, other than when being paid workers' compensation, the worker was employed and paid pursuant to the terms of the Tanning Industry Award 1987, an award made pursuant to the Conciliation and Arbitration Act 1904 (Cth). Clause 9 of the Award provided that, except as to casual workers and subject to certain provisos, employment was by the week. Clause 10 provided that an adult employee shall be paid at a rate 'of pay per week', and clause 19 that 'the ordinary hours of work shall be an average of 38 per week to be worked on one of the alternative bases'.

The appeal before the High Court of Australia concerned the construction of the words 'the ordinary time rate of pay of the worker (as expressed by reference to a week)' in s. 69(1)(a)(ii) of the Workers Compensation Act 1988 (Tas) ('the Act').

Section 69(1) provided that the compensation payable in respect of injury was

> (a) in the case of the total incapacity of the worker for work, weekly payments equal to
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> (i) the average weekly earnings of the worker; or
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> (ii) the ordinary time rate of pay of the worker (as expressed by reference to a week) for the work in which he was engaged immediately before the period of incapacity, or whichever was the greater.

Held:

The worker was entitled to be paid compensation in an amount representing 38 hours of work at the ordinary time rate for the work upon which he was engaged before the commencement of his incapacity unless that amount was lower than his average weekly earnings over the preceding 12 months.

Unless the context otherwise required, 'ordinary time rate of pay' meant the rate of pay for the standard or ordinary hours of work in contrast to the overtime or penalty rate of pay for hours of work other than the standard or ordinary hours. When expressed by reference to a week, it referred to the product of multiplying that hourly rate by the standard 35, 38 or 40 hour week, as the case might be, as fixed by legislation, industrial award or agreement.

The expression 'ordinary time rate of pay (as expressed by reference to a week)', was intended by the legislature to apply only to rates of pay fixed by industrial awards or agreements.

First, the terms of s. 69(3) suggested that the second limb of s. 69(1((a) was dealing with a rate fixed by an industrial award or agreement and not the actual pay or hours worked by the worker in accordance with an agreement with

the employer. Subsection (3) plainly assumed that that expression was an impersonal concept which was not dependent on the particular contract between the injured worker and the employer, that 'the ordinary time rate of pay' was a measure that could be ascertained without recourse to any agreement between the injured worker and the employer.

Secondly, the expression 'ordinary time rate of pay' was not an expression which hitherto had ordinarily been found in individual employment contracts, which usually failed to distinguish between rate of pay for ordinary and other hours. The expression had an established and special meaning in the context of employment and industrial relations. Accordingly, it was that meaning which the words must bear in s. 69(1)(a) in their application to employment governed by an industrial award or agreement.

Once it was accepted that the legislature intended the 'ordinary time rate of pay' in s. 69(1)(a)(ii) and (3) to mean a rate fixed by an industrial award or agreement, it was inconceivable that it intended that the words 'as expressed by reference to a week' in those subsections to mean the hours agreed to be worked by the worker each week and not the ordinary hours for a week fixed by that award or agreement. In the context of s. 69(1) and (3), the phrase 'by reference to a week' obviously meant the period which legislation or an industrial award or agreement fixed as the number of hours for a standard working week of ordinary time hours for the relevant work.

No assistance was to be obtained in the construction of s. 69(1)(a) by reference to what was fair to the employer or to the worker. Section 69(1) provided that the worker was to be paid the higher of the two amounts to which s. 69(1)(a) referred. If the amount calculated by reference to the ordinary time rate of pay was higher than the amount of the worker's average weekly earnings over the preceding 12 months, the worker might obtain compensation which was higher than the wages he had been earning at the commencement of the period of incapacity.

Furthermore, the second limb was concerned with the work upon which the worker was engaged immediately before the period of **incapacity** began and not with the actual work the worker was performing at the time of injury.

Moreover, the philosophy of modern workers' compensation legislation was that compensation was payable for the loss of the worker's capacity to earn in the future, and incapacity was not measured by what the worker was earning in the industry or employment in which the injury occurred. To compensate a worker by reference only to what he or she was actually earning might produce serious injustice in the case of a worker who was totally incapacitated at the time of the commencement of the incapacity. Not surprisingly, the operation of s. 69(1)(a) in its application to a casual worker might result in the worker receiving an amount of compensation higher than the ordinary wages of the casual worker.

[Appeal allowed].

Cases referred to:

Catlow v. Accident Compensation Commission [1989] 167 CLR 543 ***(refd)***

Goodyear Rubber Co. v. Robinson and Brain [1961] 60 AR (NSW) 127 at p. 137 ***(dist)***

Kezich v. Leighton Contractors Pty. Ltd. [1974] 131 CLR 362 ***(dist)***

Brain and Robinson v. Goodyear Tyre Co. [1959] 58 AR (NSW) 643, at p. 648 ***(dist)***

Dunlop Perdriau Rubber Co. Ltd. v. Federated Rubber Workers' Union of Australia [1931] 46 CLR 329 at p. 341 ***(dist)***

Anslow v. Cannock Chase Colliery Company Limited [1909] AC 435 ***(dist)***

Williams v. Metropolitan Coal Co. Ltd. [1948] 76 CLR 431 ***(refd)***

Thompson v. Armstrong and Royse Pty. Ltd. [1950] 81 CLR 585 ***(refd)***

Arnotts Snack Products Pty. Ltd. v. Yacob [1985] 155 CLR 171 ***(refd)***

Legislation referred to:

Accident Compensation Act 1985, s. 95(1)
Annual Holidays Act (NSW) 1944, s. 2(1)
Conciliation and Arbitration Act 1904
Workers Compensation Act 1956 (NZ), s. 15(1)
Workers Compensation Act 1988, ss. 69(1)(a)(ii) (2)(3),70, 71, 72

Other sources referred to:

The Australian Encyclopedia of Forms and Precedents, 3rd Edn., Vol. 6

JUDGMENT

Mason CJ:

This appeal concerns the construction of the words "the ordinary time rate of pay of the worker (as expressed by reference to a week)" in s. 69(1)(a)(ii) of the Workers Compensation

Act 1988 (Tas.) ("the Act"). The Full Court of the Supreme Court of Tasmania unanimously held that, upon the proper construction of s. 69(1)(a), the appellant ("the worker") who was relevantly employed for two eight-hour shifts each week, was to be compensated for his total incapacity for work on the basis of a 16 hour week. It rejected the argument of the worker that his compensation was to be calculated on the basis of the 38 hours per week which were the "ordinary hours of work" for a week under the industrial award which governed his employment. The question in the appeal is whether the words "as expressed by reference to a week" mean that the compensation payable to a worker is to be calculated by reference to the actual number of hours he or she ordinarily works in a week or by some other criterion and, if so, what criterion.

The factual background

The worker sustained injury on 8 September 1989 in the course of his employment as a casual labourer with the second respondent ("the employer"). The first respondent is the employer's licensed compensation insurer ("the insurer"). Initially, the worker was paid compensation on the basis of a 38 hour week. However, after a period, the employer and the insurer applied to a Workers Compensation Commissioner for a review of those payments. They sought a determination that the amount of weekly compensation to be paid to the worker was to be calculated by reference to a 16 hour week. The application was dismissed by Commissioner Sikk. An appeal against that decision to the Supreme Court of Tasmania was dismissed by Zeeman J. However, the Full Court of the Supreme Court of Tasmania allowed the appeal.

Some agreed facts were put before Commissioner Sikk. But it was conceded before Zeeman J. that two of them could not be construed literally. The effect of the agreed facts when read with the concession is as follows. On or about 6 September 1989, the employer engaged the worker as a labourer. They agreed that the worker was to be employed for eight hours on the Wednesday and Friday of each week. At all material times, other than when being paid workers' compensation, the worker was employed and paid pursuant to the terms of the Tanning Industry Award 1987, an award made pursuant to the Conciliation and Arbitration Act 1904 (Cth). Clause 9 of the award provides that, except as to casual workers and subject to certain provisos, employment is by the week. "Casual employee" is defined in cl.8 to mean "an employee (other than a regular employee) employed and paid by the day, who shall not be employed as a casual employee for more than ten days from the time of commencing employment". Clause 10 provides that an adult employee shall be paid at a rate "of pay per week". The rate varies according to the class of work on which the employee is engaged. An employee is also paid an industry loading of $13.55 per week. Clause 13 provides for the payment of casual workers. It provides:

> (a) A casual worker is a worker engaged and paid as such. A casual employee for working ordinary time shall be paid per hour, one thirty-eighth of the weekly rate prescribed by this Award for the work the employee performs plus twenty percent.The employment of a casual worker may be terminated by the giving of one hour's notice by either side.
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> (b) A period of engagement shall not exceed ten working days continuously, provided that the period may extend beyond ten days with the written consent of the Union Branch

The construction of s. 69 of the Act

Section 69(1) of the Act provides:

> Subject to this section, where total or partial incapacity for work results from an injury suffered by a worker and where the existence of such total or partial incapacity is supported by a certificate in the prescribed form from a medical practitioner, the compensation payable to him under this Act is, in addition to any lump sum that may be payable under ss. 71 or 72 in respect of that injury -
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> (a) in the case of the total incapacity of the worker for work, weekly payments equal to -
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> (i) the average weekly earnings of the worker; or
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> (ii) the ordinary time rate of pay of the worker (as expressed by reference to a week) for the work in which he was engaged immediately before the period of incapacity,
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> whichever is the greater.
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> ...

The first limb of s. 69(1)(a) is concerned with the actual earnings of the worker. It takes the average weekly earnings of the worker as the criterion for measuring his or her entitlement to compensation "[A]verage weekly earnings" are defined to mean "the average weekly earnings of the worker over the period of 12 months ending at the commencement of the period of incapacity" s. 69(2). The average weekly earnings of a worker are determined in accordance with the provisions of s. 70 of the Act. The second limb of s. 69(1)(a) is not necessarily concerned with the actual earnings of the worker. It uses an objective benchmark - "the ordinary time rate of pay of the worker (as expressed by reference to a week)" - as the criterion of compensation.

The expression "ordinary time rate of pay" is well known in the industrial relations field in Australia and New Zealand. It and similar terms have long been used in legislation (See for example, Annual Holidays Act (NSW) 1944, s. 2(1) Workers' Compensation Act 1956 (NZ), s. 1591) (now repealed); Accident Compensation Act 1985 (Vic.), s. 95(1) (now repealed).) Unless the context otherwise requires, "ordinary time rate of pay" means the rate of pay for the standard or ordinary hours of work in contrast to the overtime or penalty rate of pay for hours of work other than the standard or ordinary hours (*Catlow v. Accident Compensation Commission* [1989] 167 CLR 543, at pp. 555-556, 560). When expressed by reference to a week, it refers to the product of multiplying that hourly rate by the standard 35, 38 or 40 hour week, as the case may be, fixed by legislation, industrial award or agreement.

The terms of s. 69(1)(a) indicate that the legislature assumed that there is always an ordinary time rate of pay for the worker for the work on which he or she is engaged. No doubt in most cases this is true because when the 1988 Act was enacted the rates of pay of most workers were covered by industrial awards or agreements In *Catlow v. Accident Compensation Commission* (*ibid*., at p. 560), McHugh J pointed out:

> [T]he terms of employment of most workers are governed by industrial awards or agreements which provide for an ordinary time rate of pay for a standard or ordinary number of hours per week. Industrial awards and agreements usually state the number of ordinary working hours in each day and week and provide for the payment of overtime and penalty rates of pay for hours worked outside those ordinary hours.

However, it is not always the case that a worker will have an ordinary time rate of pay. There may be no industrial award or agreement regulating his or her employment, and his or her contract of employment may not distinguish between ordinary and other time rates of pay or may provide for remuneration by a formula which has no temporal element - for example, piece work or commission (See for example, *Goodyear Rubber Co. v. Robinson and Brain* [1961] 60 AR (NSW) 127, at p. 137). If the worker has no "ordinary time rate of pay", the compensation payable to him or her pursuant to s. 69(1)(a) must be calculated by reference to his or her average weekly earnings.

However, the critical question for present purposes is whether the legislature, in using the expression "ordinary time rate of pay (as expressed by reference to a week)", intended that it should apply to rates of pay fixed by individual contracts as well as industrial awards or agreements. In our opinion, the better conclusion is that the term was intended to apply only to rates of pay fixed by industrial awards or agreements. Two considerations support this conclusion.

First, the terms of s. 69(3) of the Act suggest that the second limb of s. 69(1)(a) is dealing with a rate fixed by an industrial award or agreement and not the actual pay or hours-worked by the worker in accordance with an agreement with the employer. Section 69(3) provides:

> If, during a period of incapacity of a worker, the ordinary time rate of pay (as expressed by reference to a week) for any work on which he was engaged immediately before the commencement of that period increases or decreases, the compensation payable to him shall correspondingly be increased or decreased by the like amount.

Sub-section (3) plainly assumes that "the ordinary time rate of pay (as expressed by reference to a week)" is an impersonal concept which is not dependent on the particular contract between the injured worker and his or her employer. It does not refer to "the ordinary time rate of pay of the worker" but

"the ordinary time rate of pay for any work in which he was engaged". It assumes that the "ordinary time rate of pay" is a measure that can be ascertained without recourse to any agreement between the injured worker and the employer. If "the ordinary time rate of pay" refers to a rate fixed by an industrial award or agreement, sub-s. (3) is easy to apply and will ensure that the compensation payable will be adjusted in accordance with the broad movement of wages in the industry in which the worker was engaged. If the expression "the ordinary time rate of pay (as expressed by reference to a week)" also refers to a rate fixed by contract between the employer and the insured worker, sub-s. (3) would be difficult, although perhaps not always impossible, to apply. Nevertheless, it seems unlikely that the legislature should have intended that the amount of compensation of the injured worker should be increased or **decreased** by reason of a private agreement between the employer and another worker who was employed to do work of the class which the injured worker was doing Moreover, the provision would be unworkable if the employer had different contracts with different rates of pay (perhaps dependent on seniority) for that work.

The evident object of s. 69(3) is that changes in work value should be reflected in the amount of compensation which the worker receives. That object will be achieved if s. 69(3) is interpreted to apply only to industrial awards or agreements. It is likely to be thwarted if employers can regulate the amount of compensation payable to employees by manipulating the "ordinary time rate" payable for work of the class done by the injured worker before his or her period of incapacity commenced. The terms of s. 69(3) strongly indicate that s. 69(1)(a)(ii) is dealing with a rate fixed by an industrial award or agreement and not with a rate fixed by an individual agreement between an employer and worker.

Secondly, although the expression "ordinary time rate of pay" may sometimes be found in individual employment contracts, it is not an expression which hitherto has ordinarily been found in such contracts (See for example, the precedents of employment agreements in **The Australian Encyclopedia of Forms and Precedents,** 3rd Edn., Vol. 6 pp. 14101-14421 which contain no reference to the expression). Private employment agreements usually fail to distinguish between rates of pay for ordinary and other hours. Consequently, if s. 69(1)(a)(ii) was intended to apply to individual employment contracts, in most cases the Commissioner and the courts would have to construct the "ordinary time rate of pay" by determining what were the ordinary hours of work for the week and then determine the rate for that work. In s. 69(1)(a)(ii) "ordinary time" is an adjectival expression qualifying "rate of pay" (See *Catlow* [1989] 167 CLR, at p. 550) and the rate of pay is to be expressed by reference to a week. The paragraph is referring to those hours during the week which are paid for at a base rate as opposed to those working hours which are paid for at different (usually higher) rates. In some contexts, "ordinary time" may mean "regular, normal, customary, usual" time (See *Kezich v. Leighton Contractors Pty. Ltd.* [1974] 131 CLR 362, at p. 365). Thus in *Kezich v. Leighton Contractors Pty. Ltd.* ([1974] 131 CLR 362), this Court held that the words "the ordinary hours he would have worked, if he were not incapacitated for work as a result of the injury" in cl.2 of the Schedule to the Workers' Compensation Act 1912 (W.A.) referred to the hours during which it was usual for the employee to work. In that case, Gibbs J. considered that it was not legitimate to construe the statute by reference to the meaning which the words bore in industrial awards and agreements (*ibid.*, at p. 364). However, in this case, unlike *Kezich*, the relevant expression "ordinary time rate of pay" has an established and special meaning in the context of employment and industrial relations. Accordingly, it is that meaning which the words must bear in s. 69(1)(a) in their application to employment governed by an industrial award or agreement. In such an award or agreement, the expression "ordinary time" cannot mean the customary or usual hours of work. That being so, no justification exists for interpreting the expression in its application to an individual employment contract as meaning the customary or usual hours of work. In s. 69(1)(a)(ii), "ordinary time" means the fixed standard hours as opposed to overtime or usual or customary time. However, just as individual employment contracts usually fail to distinguish between "ordinary time rates" of pay and other rates of pay, so do the majority of

them fail to distinguish between the fixed standard hours and other working time. Consequently, s. 69(1)(a)(ii) would seem to have little scope for operation in relation to private employment contracts. By itself, this factor could not be decisive, but it is strong confirmation of the construction which flows from the presence of s. 69(3) in the Act.

It is true that in *Brain and Robinson v. Goodyear Tyre Co.* [1959] 58 AR (NSW) 643, at p. 648, the Full Bench of the New South Wales Industrial Commission held that the ordinary time rate of pay of an employee is not necessarily the award rate, and that it may be the paid rate". In that case, the legislation involved was annual leave legislation, and it was necessary to determine the "ordinary pay" of the worker which was defined to mean "remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay". Other provisions of the legislation provided for the calculation of the "ordinary pay" "where no ordinary time rate of pay is fixed for a worker's work under the terms of his employment". Thus, the context lent some support to the conclusion that the definition of "ordinary pay" applied to private employment agreements. However, having regard to the different context of s. 69(1)(a)(ii) the decision in *Brain and Robinson* is of no assistance in the present case.

Accordingly, in our opinion, the expression "ordinary time rate of pay" in s. 69(1)(a)(ii) refers to a rate fixed by an industrial award or agreement and does not cover a rate fixed by an individual employment contract.

Once it is accepted that the legislature intended the term "the ordinary time rate of pay" in s. 69(1) and (3) to mean a rate fixed by an industrial award or agreement, it is inconceivable that it intended the words "as expressed by reference to a week" in those subsections to mean the hours agreed to be worked by the worker each week and not the ordinary hours for a week fixed by that award or agreement. No doubt the word "week" is an ambiguous word. In *Dunlop Perdriau Rubber Co. Ltd. v. Federated Rubber Workers' Union of Australia* [1931] 46 CLR 329, at p. 341, Dixon J. said that it "is capable of meaning the calendar week commencing on Sunday, any consecutive seven days, the week observed by the particular employer in the calculation of wages, or the five days from Monday to Friday which the award calls a week; and other meanings may be suggested". But, in the context of s. 69(1) and (3) of the Act, the phrase "by reference to a week" obviously means the period which legislation or an industrial award or agreement fixes as the number of hours for a standard working week of ordinary time hours for the relevant work.

If the "week" mentioned in par.(ii) of sub-s. (1)(a) imported a reference to the hours actually worked by the injured worker, an application of that paragraph to the case of a casual worker would require the selection of a particular seven-day period before "the ordinary time rate of pay" could be calculated. If the worker's hours varied from week to week, the selection would adventitiously affect the quantum of compensation. Moreover, "the ordinary time rate of pay" by which sub-s. (3) measures the periodic adjustment of weekly compensation cannot be calculated by reference to the hours worked by the injured worker in a particular week, for the weeks to which that sub-section refers are weeks during the worker's incapacity. The term "week" in s. 69 by reference to which "the ordinary time rate of pay" is to be expressed cannot be a week in which the hours actually worked provide the rate of pay; it must be a week in which the hours to be worked at the ordinary time rate are fixed by the relevant award or industrial agreement.

The foregoing conclusion leads to the result that, if the amount calculated by reference to the ordinary time rate of pay is higher than the amount of the worker's average weekly earnings over the preceding 12 months, the worker may obtain compensation which is higher than the wages he or she was earning at the commencement of the period of incapacity. In the case of a casual worker, this may mean that that person is entitled to be compensated at the same rate as a permanent or full-time employee and in some cases at an even higher rate than a full-time employee.

In the Full Court, Wright J., with whose judgment Cox J. agreed, said that it "is a little difficult to see why his [that is the casual worker's] employer should be required to compensate him at the same level as he would be required to compensate a full time employee".

However, these remarks overlook the effect of the direction in s. 69(1) that the worker is to be paid the higher of the two amounts to which s. 69(1)(a) refers. If the average weekly earnings of the casual worker are high enough, the employer may be required to compensate the casual worker at an even higher rate of compensation than he or she would be required to compensate a full-time employee. In the present case, for example, if the average weekly earnings of the worker over the previous 12 months had been a sum several times higher than the weekly payments which he received from the employer, he would have been entitled to receive compensation at that higher rate.

In any event, no assistance is to be obtained in the construction of s. 69(1)(a) by reference to what is fair to the employer or to the worker. Sometimes, the terms of the subsection may work in favour of the employer; sometimes they may work in favour of the worker. When s. 69(1)(a)(ii) is the governing provision, the compensation payable may have only the slightest relationship to the usual earnings of the worker at the commencement of his or her period of incapacity. An example is a worker who has recently been working a great deal of overtime at higher rates of pay but immediately before his or her incapacity is working at a much lower ordinary time rate of pay. Unless his or her average weekly earnings over the previous 12 months are higher than the ordinary time rate of pay, he or she must be compensated at the ordinary time rate even though for some weeks before the incapacity he or she had been earning, and was likely to continue to earn, at a higher rate. On the other hand, immediately before the period of incapacity commenced, the worker may have been temporarily engaged on work for which a higher rate was payable than was payable for the work which that person normally performed. In that case, the worker is entitled to compensation at a higher rate than his or her usual weekly wages.

Furthermore, the second limb is concerned with the work upon which the worker was engaged immediately before the period of **incapacity** began and not with the actual work the worker was performing at the time of injury. Although it is usually the case that total incapacity precedes any period of partial incapacity, it is not uncommon for a period of total incapacity to follow a period of partial incapacity. Workers who sustain back injuries, contract dermatitis or develop asbestosis will frequently become totally incapacitated some time after the occurrence of the injury which entitles them to workers' compensation. The period between injury and total incapacity will often be broken by a period or periods of partial incapacity. What the worker was earning at the commencement of the period of total incapacity may bear little relationship to what that person normally earned or could have earned but for the total incapacity. Moreover, in some cases the period of total incapacity may commence when the worker is no longer employed by the employer for whom the worker worked when he or she suffered the injury which gives rise to the right to compensation.

Wright J. also relied on the words of Lord Loreburn LC. in *Anslow v. Cannock Chase Colliery Company Limited* [1909] AC 435, which he thought "still express the main thrust of modern workers' compensation", to support his construction of the Act. In Anslow (*ibid*., at p. 437), Lord Loreburn said:

> The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident.

However, that proposition is not applicable to the Tasmanian legislation. Section 69(1) directs that the worker is to be paid an amount equivalent to his or her average weekly earnings if that amount is higher than the ordinary time rate of pay (as expressed by reference to a week) for the work in which he or she was engaged, immediately before the period of **incapacity**. Those average weekly earnings may be the product of earnings in other jobs for other employers (See s. 70)

Moreover, the statement of Lord Loreburn is not consistent with the view of modern workers' compensation legislation which the Court has taken, *viz*., that the scheme of workers compensation legislation is that compensation is payable for the loss of the worker's capacity to earn in the future and that incapacity is not measured by what the worker was earning in the industry or employment in

which the injury occurred (*Williams v. Metropolitan Coal Co. Ltd.* [1948] 76 CLR 431, *Thompson v. Armstrong and Royse Pty. Ltd.* [1950] 81 CLR 585, *Arnotts Snack Products Pty. Ltd. v. Yacob* [1985] 155 CLR 171). In *Williams v. Metropolitan Coal Co. Ltd.* [1948] 76 CLR 444, Starke J. said:

> Compensation is not payable for the injury but for the loss of power to earn caused by the injury, that is, for incapacity for work which results from the injury. The question is whether the injury has left the worker in such a position that in the open labour market his earning capacity in the future is less than it was before the injury.

In *Thompson v. Armstrong and Royse Pty. Ltd.* ([1950] 81 CLR p. 621), Kitto J. said:

> Loss of wages is in most cases a result of, but it does not itself constitute, the relevant economic fact. That fact is the inability, or the reduced ability, by reason of a physical deficiency, to sell work for wages.

These statements were made in cases concerning partial incapacity for work but they accurately reflect the philosophy of modern workers' compensation legislation in relation to total incapacity. To compensate a worker by reference only to what he or she was actually earning may produce serious injustice if, for some reason, the worker was not exercising all his or her working capacity at the time of the commencement of the incapacity.

The legislature has adopted a formula in s. 69(1)(a) whose evident object is to ensure that, throughout a period of total incapacity, the worker will receive a weekly sum that is either equivalent to his or her average weekly earnings or, if that amount is below the ordinary time rate of pay, an amount that represents fair weekly compensation having regard to the work that the worker was doing immediately before the incapacity commenced. It should occasion no surprise that the operation of the paragraph, in its application to a casual worker who is totally incapacitated, may result in the worker receiving an amount of compensation higher than the ordinary wages of the casual worker. What the casual worker was earning at the commencement of the period of total incapacity may bear no relationship to the value of the earning capacity which has been lost as the result of the injury sustained.

Accordingly, the hours of work of a casual employee are irrelevant in determining compensation for the purpose of s. 69. To determine that compensation, s. 69(1) directs that a comparison be made between the average weekly earnings of the worker and the ordinary time rate of pay (as expressed by reference to a week) for the work in which he or she was engaged immediately before the period of incapacity. If no ordinary time rate of pay for that work is fixed by an industrial award or agreement, the worker is to be compensated in accordance with his or her average weekly earnings. If the ordinary time rate of pay of the worker (as expressed by reference to a week) for the work is greater than the average weekly earnings, the worker is to be compensated at that rate. In s.69(1)(a)(ii), a week is a reference to the relevant week under the industrial award or agreement.

In the present case, the award declares that "the ordinary hours of work shall be an average of 38 per week to be worked" on one of four alternative bases (cl. 19). Consequently, the worker is entitled to be paid compensation in an amount representing 38 hours of work at the ordinary time rate for the work upon which he was engaged before the commencement of his incapacity unless that amount is lower than his average weekly earnings over the preceding 12 months.

Order

The appeal must be allowed.